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BEFORE THE ARIZONA CORPORATION COMMISSION

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ARIZONA CORPORATION COMMISSION  
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Arizona Corporation Commission

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IN THE MATTER OF THE FORMAL  
COMPLAINT AGAINST QWEST  
CORPORATION FILED BY GARY R. BAHR  
AND LARRY C. ROWLEY

DOCKET NO. T-01051B-10-0052

QWEST CORPORATION'S MOTION  
TO DISMISS

Pursuant to 12(b)(6), Ariz. R. Civ. P., Respondent Qwest Corporation ("Qwest") requests that the Arizona Corporation Commission (the "Commission") dismiss the Complaint filed by Complainants Gary R. Bahr and Larry C. Rowley's (collectively "Complainants") because (i) the Complaint does not name Qwest as a party; (ii) Complainants fail to state a claim upon which relief can be granted; (iii) the Commission lacks jurisdiction over the Complaint; (iv) the Complaint is barred by the applicable statute of limitations; and (v) Complainants lack standing to bring their Complaint. For these reasons and as further set forth below, the Commission should dismiss the Complaint with prejudice.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. FACTUAL BACKGROUND.**

On February 2, 2010, Complainants filed their Complaint against "Thim Water, Time Warner, Trico Electric [and] Quest Cable." Complaint p. 1. Qwest Corporation is *not* listed

1 anywhere on the Complaint. Qwest received a copy of the Complaint from the Commission on  
2 February 18, 2010.

3 The Complaint generally alleges that “the utilities” trenched Silver Star Drive and  
4 negligently left the road in an unusable condition. Complaint p. 1. The Complaint further  
5 alleges that Complainants have known about the alleged damage for “three plus years.”  
6 Complaint p. 1. The Complaint requests that Silver Star Drive be “return[ed] to the state is was  
7 in previous to the utilities’ trenching.” Complaint p. 1.

8 Notably, Silver Star Drive is a dedicated ingress / egress road, located in Pima County,  
9 Arizona. The road is not owned by the Complainants. Additionally, none of the Complainants  
10 are Qwest telephone customers. Notably, the Complaint lacks any allegation that Complaints  
11 receive utility service from Qwest.

## 12 **II. LEGAL ANALYSIS.**

13 A complaint should be dismissed pursuant to Rule 12(b)(6), Ariz.. R. Civ. P., if the  
14 plaintiff would not be entitled to relief on any interpretation of the facts alleged in the complaint.  
15 *Doe v. State*, 200 Ariz. 174, 175, 24 P.3d 1269, 1270 (2001); *Menendez v. Paddock Pool Const.*  
16 *Co.*, 172 Ariz. 258, 261, 836 P.2d 968, 971 (App. 1991).

### 17 **A. The Complaint Does Not Name Qwest.**

18 Qwest Corporation is not named anywhere in the Complaint. The Complainants do not  
19 receive service from Qwest. Despite this fact, the Commission forwarded the Complaint to  
20 Qwest, presumably under the assumption that Complainants mistakenly listed “Quest Cable” and  
21 meant to name Qwest Corporation. Such an assumption is unfair given the lack of support in the  
22 Complaint establishing that Qwest is a proper party in this proceeding. In fact, it appears the  
23 only reason the Commission served Qwest with the Complaint is because its name is similar to  
24 “Quest Cable.” However, there are numerous entities registered in Arizona with “Qwest,”  
25 “Quest” and/or “Cable” in their names. Indeed, based on the face of the Complaint, there is  
26 simply no way to know if Complainants intended to name Qwest or whether the Commission

1 served the proper party.

2 Moreover, even if Complainants and/or the Commission determine that Qwest is a proper  
3 party, Complainants are required to amend their Complaint to properly name Qwest. Until then,  
4 Qwest should not be forced to expend its resources defending against an ill-researched  
5 Complaint to which it is not even a party.

6 **B. Complainants Fail To State A Claim Against Qwest.**

7 Even assuming Qwest is interchangeable with “Quest Cable” for the purposes of the  
8 Complaint (which it is not), the Complaint fails to adequately state a claim against Qwest. In  
9 order to survive dismissal, a complaint must “give the opponent fair notice of the nature and  
10 basis of the claim and indicate generally the type of litigation involved.” *Cullen v. Auto-Owners*  
11 *Ins. Co.*, 218 Ariz. 417, 419, 189 P.3d 344, 346 (2008); Rule 8(a)(2), Ariz. R. Civ. P. (stating a  
12 pleading must contain “[a] short plain statement of the claim showing that the pleader is entitled  
13 to relief”). Even under the liberal notice pleading rules, a plaintiff’s obligation to provide the  
14 grounds for entitlement to relief requires more than simply reciting conclusory statements. *Dube*  
15 *v. Likins*, 216 Ariz. 406, 415, 167 P.3d 93, 102 (App. 2007) (“Even under liberal notice pleading  
16 rules, a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more  
17 than labels and conclusions.”) (internal citations and punctuation omitted). Indeed, a plaintiff  
18 cannot survive dismissal by asserting that he “might later establish some set of undisclosed facts  
19 to support recovery.” *Id.* (internal citations and punctuation omitted).

20 The Complaint does not meet the notice pleading standard. Complainants only generally  
21 allege that the “utility companies” negligently left Silver Star Drive in unusable condition after  
22 performing trench work. Complaints, however, fail to identify which of the four different  
23 utilities actually performed the trenching and thus caused Silver Star Drive to become allegedly  
24 unusable.<sup>1</sup> In fact, Complainants do not even identify when the alleged trenching took place, and  
25

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26 <sup>1</sup> The only allegation specifically identifying “Quest Cable” is the following: “Quest cable was washed out to the surface on Silver Star Drive and instead of repairing the damage to road and

1 thus, Qwest has no way to verify whether it partook in the actions alleged. Consequently, Qwest  
2 does not have fair notice of the nature or basis of Complainants' claims against it and cannot  
3 adequately defend against those claims.

4 Moreover, it is not even clear that Complainants intend to assert any claims against  
5 Qwest at all, as neither Qwest nor "Quest Cable" is listed as a "Responsible Party." In fact, in  
6 the section of the Complaint labeled "Nature of Relief Sought," Complainants assert that "*the*  
7 *State* has the responsibility to provide for the health and welfare of its citizens." Accordingly,  
8 the Complaint appears to demand that the State (not Qwest or the other utilities) repair Silver  
9 Star Drive.

10 **C. Complainants' Claim Is Barred By The Statute Of Limitations.**

11 Because Complainants' claim arises in negligence, it is barred by the statute of  
12 limitations. A party may raise the affirmative defense of statute of limitations as the basis for a  
13 motion to dismiss if the facts supporting the defense appear on the face of the complaint.  
14 *McCloud v. Ariz. Dep't of Pub. Safety*, 217 Ariz. 82, 85, 170 P.3d 691, 694 (App. 2007). Claims  
15 brought after the expiration of the applicable statute of limitations are barred conclusively.  
16 *Montano v. Browning*, 202 Ariz. 544, 546, 48 P.3d 494, 496 (App. 2002). The statute of  
17 limitations for a negligence claim is two years. *Kellogg v. Willy's Motors, Inc.*, 140 Ariz. 67, 70,  
18 680 P.2d 203, 206 (App. 1984).

19 Here, based on the face of the Complaint, Complainants' claim accrued more than two  
20 years ago. Indeed, Complainants specifically state that they "have been trying in vain *for the*  
21 *last three plus years* to get someone to recognize the damage done to our road and property  
22 values." Complaint p. 2 (emphasis added). Because Complainants did not file their Complaint  
23 until over three years after their cause of action accrued, their claim is time-barred. Thus, the  
24 Commission should dismiss their Complaint.

25 trench, they cut the cable, and ran away from their responsibility." Complaint p. 2. As set forth  
26 above, this single allegation does not identify which utility "trenched" Silver Star Drive, and  
thus, cannot establish liability.

1           **D. The Commission Does Not Have Jurisdiction Over Complainants'**  
2           **Complaint.**

3           Complainants seem to allege that the utilities acted negligently by trenching the Silver  
4 Star Drive. Claims involving theories of tort, however, fall outside the Commission's  
5 jurisdiction. Specifically, courts have stated that tort claims are "far a field of the Commission's  
6 area of expertise and statutory responsibility" and are instead "the type of traditional claims with  
7 which our trial courts of general jurisdiction are most familiar and capable of dealing." *Qwest*  
8 *Corp. v. Kelly*, 204 Ariz. 25, 32, 59 P.3d 789, 796 (App. 2003), citing *Campbell v. Mountain*  
9 *States Tel. & Tel. Co.*, 120 Ariz. 426, 431-32, 586 P.2d 987, 992-93 (App. 1978).

10          A.R.S. §40-246 governs complaints brought against public service corporations before  
11 the Commission. It provides, "Complaint may be made . . . setting forth any act . . . by a public  
12 service corporation in violation, or claimed to be in violation, of any provision of law or any  
13 order or rule of the commission[.]" The Complainants do not assert any violation of law, or  
14 violation of any order or rule of the Commission.

15          Additionally, Complainants do not own Silver Star Drive. Qwest has facilities in Silver  
16 Star Drive pursuant to a 1985 grant of an easement for ingress, egress and utilities made to the  
17 public by the landowner at that time. The matter of an interest in land and the rights and  
18 obligations that pertain thereto are either matters of real estate law or contract, both of which are  
19 matters solely within the jurisdiction of courts of general jurisdiction, and not within the  
20 jurisdiction of the Commission. *U S WEST Communications, Inc. v. Arizona Corp. Comm'n*,  
21 185 Ariz. 277, 280, 915 P.2d 1232, 1235 (App. 1996); *General Cable Corp. v. Citizens Utilities*  
22 *Co.*, 27 Ariz. App. 381, 386, 555 P.2d 350, 355 (App. 1976); *Trico Electric Cooperative v.*  
23 *Ralston*, 67 Ariz. 358, 365, 196 P.2d 470, 474 (1948). Accordingly, the Commission should  
24 dismiss the Complaint because it lacks subject matter jurisdiction.

25           **E. Complainants Do Not Have Standing.**

26          Arizona courts have long required that persons seeking redress must first establish  
standing to bring their claims. *Bennett v. Brownlow*, 211 Ariz. 193, 195, 119 P.3d 460, 462

1 (2005).<sup>2</sup> Complainants cannot meet this burden. Specifically, Complainants seek to “return  
2 Silver Star Drive to the state it was in previous to the utilities['] trenching.” Complaint p. 2.

3 First, Complainants are not Qwest telephone customers and do not receive any Qwest  
4 services and lack standing to complain about Qwest’s provision of service. Second, the facilities  
5 that a utility places in public streets and on private property do not constitute the “utility  
6 service.” Moreover, Complainants do not own Silver Star Drive; thus, they have no standing to  
7 ask the Commission to order Qwest (or the other utilities) to perform work on it.

8  
9 **III. CONCLUSION.**

10 For the foregoing reasons, the Commission should dismiss the Complaint with prejudice.

11 DATED this 2nd day of March, 2010.

12  
13 QWEST CORPORATION

14  
15 By: 

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23  
24  
25  
26 <sup>2</sup> Arizona courts generally decline jurisdiction if there is no standing. *Karbal v. Arizona Dept. of Revenue*, 215 Ariz. 114, 116, 158 P.3d 243, 245 (App. 2007).

1 **Original and 13 copies of the foregoing**  
2 **were filed this 2nd day of March, 2010 with:**

3 Docket Control  
4 Arizona Corporation Commission  
5 1200 West Washington Street  
6 Phoenix, AZ 85007

7 **COPY of the foregoing emailed**  
8 **this 2nd day of March, 2010 to:**

9 Lyn Farmer, Chief Administrative Law Judge  
10 Hearing Division  
11 ARIZONA CORPORATION COMMISSION  
12 1200 W. Washington  
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14 Janice Alward, Esq.  
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20 Utilities Division  
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24 **COPY of the foregoing emailed/mailed**  
25 **this 2nd day March, 2010 to:**

26 Gary Bahr  
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